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No. 82-1266

In the Supreme Court of the United States
OCTOBER TERM, 1982

LANCE EISENBERG, PETITIONER
v.
UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT**

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioner challenges the conspiracy count in his indictment. He and two other individuals, Mick and Tom Hajecate, were charged as defendants in the United States District Court for the Southern District of Texas in an 11-count indictment. Count One charged all three with conspiring (Pet. App. 28a-37a) to (1) defraud the United States by impeding, impairing, obstructing, and defeating the lawful function of the Internal Revenue Service in the ascertainment, computation, assessment, and collection of income taxes; (2) defraud the United States by impeding, impairing, obstructing and defeating the lawful function of the United States Customs Service in the collection, maintenance, and distribution of records pertaining to covered financial transactions of United States persons with foreign financial institutions, in violation of 31 U.S.C. 1121; (3) willfully make false statements on the 1976 and 1977 individual income tax returns of Mick Hajecate and Tom

Hajecate, in violation of 18 U.S.C. 1001; and (4) willfully transport to Houston, Texas, from Georgetown, Grand Cayman Island, monies in amounts exceeding \$5,000 in United States currency without reporting the transportation of the monies to the United States Customs Service, in violation of 31 U.S.C. 1101. Counts Two and Three charged petitioner with aiding and abetting the Hajecates when they filed their false 1976 federal income tax returns, in violation of 18 U.S.C. 2 and 1001 (Pet. App. 38a-39a). None of the remaining counts in the indictment named petitioner as a defendant (Pet. App. 39a-44a).

Petitioner moved to dismiss the counts of the indictment against him. He challenged Count One on the grounds that: (1) it was too vague to state an offense; (2) it failed to specify whose tax liability was at issue; (3) the substantive offenses involving the making of false statements on the Hajecates' tax returns, charged as objects of the conspiracy, were legally insufficient because 18 U.S.C. 1001 was an inappropriate charge; and (4) the portion of the conspiracy count charging conspiracy to transfer funds from the Cayman Islands was vague. Petitioner challenged the substantive false statement counts (Counts Two and Three) on the grounds that: (1) the regulation (31 C.F.R. 103.24), upon which the question on the tax return concerning control over a foreign bank account was based, was vague and exceeded the statutory authorization (31 U.S.C. 1121(a)(1)); (2) under *United States v. Levy*, 533 F.2d 969 (5th Cir. 1976), there could be no prosecution for falsely answering a question that was not authorized by a statute or regulations; (3) the false negative responses to the questions on the Hajecates' tax returns were within the so-called "exculpatory no" rule; and (4) 18 U.S.C. 1001 is inapplicable in a prosecution for false statements on an income tax return because a more specific statute (26 U.S.C. 7206(1)) preempts its application in such cases.

After a hearing on the motion, the district court dismissed the indictment in its entirety. The court of appeals affirmed in part and reversed in part (Pet. App. 1a-22a). The court held that (1) the conspiracy charge (Count One) was sufficient as to three of the four objects (first, second and fourth) alleged; (2) the so-called "exculpatory no" rule was a complete defense to Counts Two and Three, charging violations of 18 U.S.C. 1001 by falsely answering the questions on the tax returns concerning control over foreign bank accounts; and (3) the third object of the conspiracy charge (which related to false answers to the foreign bank account questions on the tax returns) similarly could not stand because of the "exculpatory no" defense.

2. Petitioner contends that the conspiracy charge against him failed to state an offense with respect to one of the objects, that it is unconstitutionally vague, and that another alleged object of the conspiracy was improperly raised to the level of a felony.

Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court.¹ The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to dismiss. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of the final judgment against him. Accordingly, review by

¹It is now more than two years since the return of the indictment and the district court's dismissal order. Further interlocutory review at this time would cause serious additional delay in the trial of the charges against petitioner.

this Court of the court of appeals' decision would be premature at this time.²

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

APRIL 1983

²Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.